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What May Have Become a New Title VII Precedent on Affirmative Action in the Workplace: Piscataway Township Board of Education v. Taxman - "Permissible or Impermissible?"

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What May Have Become a New Title VII Precedent on Affirmative Action in the Workplace: *Piscataway Township Board of Education v. Taxman* - "Permissible or Impermissible?"

I. INTRODUCTION

There were two teachers, Sharon Taxman and Debra Williams, but due to budget cuts, one would lose her job.[1] Unfortunately, this time around, the Piscataway Township Board of Education could not do what it usually does when confronted with this type of dilemma because this time things are different.[2] Piscataway's policy for lay-offs had routinely been to lay off in the reverse order of seniority;[3] however, this time around, things were different because Ms. Taxman and Ms. Williams were both hired on the same day.[4] So, the School Board next looked at both teachers' qualifications, but despite the fact that Ms. Williams had a master's degree in addition to all the credentials that Ms. Taxman had, the School Board declared both teachers equally-qualified.[5] The School Board then decided, because Ms. Taxman was white, and Ms. Williams was black, it would use the school district's affirmative action plan as a tiebreaker.[6] Ms. Taxman lost her job.[7]

This note looks first at the historical foundation of affirmative action under the guise of Title VII of the Civil Rights Act of 1964,[8] examining both the objectives of the Act and the guidelines by which to achieve its objectives.[9] This is followed by an examination of two

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[1] Taxman v. Board of Educ., 91 F.3d 1547,1551 (3d Cir. 1996) (discussing the subsequent lawsuit filed by Taxman in which she alleges employment discrimination in violation of both federal and state statutes).

[2] *Id.* at 1551 (explaining the process for lay-offs).

[3] *Id.* (statutory tenured teachers are laid off in reverse order of seniority).

[4] *Id.* Both employees began employment on the same day. *Id.*

[5] *See* Brett Pulley, *A Reverse Discrimination Suit Upends Two Teachers' Lives*, N.Y. TIMES, Aug. 3, 1997, at 1, 32.

[6] *See Taxman*, 91 F.3d at 1551. The Board used its discretion and invoked an affirmative action policy to break the tie between the two teachers. *Id.*

[7] *See id.* Ms. Taxman was dismissed from her job on June 30,1988. *Id.*

[8] *See infra* Part II; 42 U.S.C. § 2000e-2(a) (1994).

[9] *See infra* Part II; Theresa Marks, Note, *Johnson v. Santa Clara County Transportation Agency: Affirmative Action Expanded Under Title VII*, 18 GOLDEN GATE U. L. REV. 567, 571-72 (1988).

important Title VII cases decided by the United States Supreme Court,[10] *United Steelworkers v. Weber*,[11] decided in 1979, and *Johnson v. Santa Clara County*,[12] decided in 1987. Particular attention is given to the Court's interpretation of Title VII in both cases and the issues the Court addressed. Next, this Note will review the facts and the procedural history of *Piscataway Township Board of Education v. Taxman*, which was scheduled to be argued before the United States Supreme Court in January, 1998, until the parties agreed to settle the case.[13] Specifically, the section discusses Title VII issues the United States Court of Appeals for the Third Circuit addressed on appeal.[14] Lastly, this note discusses the arguments and concerns the Supreme Court would have confronted in adjudicating this case in light of *Weber* and *Johnson*;[15] the same concerns that ultimately led the parties to settle the case.[16]

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND AFFIRMATIVE ACTION

During the 1960s, Congress enacted Title VII of the Civil Rights Act of 1964 as part of its effort to eliminate discrimination against blacks.[17] Title VII prohibits employers from making employment decisions on the basis of race or color, but it also prohibits employers from discriminating based on religion, sex, or

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[10] *See infra* Part III.

[11] 43 U.S. 193 (1979). *See infra* Part III.A.

[12] 480 U.S. 616 (1987). *See infra* Part III.B.

[13] *See infra* Parts IV, V, VI and VII.

[14] *See Taxman*, 91 F.3d at 1549-50. Here the Court specifically addresses the issue of whether Title VII allows an employee to grant a "nonremedial, racial preference in order to promote racial diversity" when the workforce is already racially balanced. *Id.*

[15] *See* David G. Savage, *Workplace Bias to the Fore: Court to Rule on Factoring Race Into Employment Decisions*, A.B.A. J., Oct. 1997, at 40. *See infra* pp. 22-30.

[16] *See* Jonathan Jaffe, *Piscataway Ends Race Case Lawsuit; White Teacher to Get Back Pay*, STAR-LEDGER (NEWARK), Nov. 21, 1997, at 1.

[17] *See* Marks, *supra* note 9, at 569 (discussing Congress' goal in enacting Title VII as an effort to do away with racial prejudice and racial discrimination confronting blacks in their attempt to attain equality in employment and in education).

national origin.[18] Concerned that simply prohibiting discrimination would not be sufficient to redress the impact of past discriminatory practices and to allow minorities and women to achieve unbiased representation in the workforce,[19] employers around the country began implementing special programs, known as "affirmative action" plans. The purpose of these plans was to assist minorities and women in fully participating "in the nation's economy."[20] As a result, Title VII has accorded validity to affirmative action plans and policies.[21]

To administer Title VII, the Civil Rights Act of 1964 established the Equal Employment Opportunity Commission (EEOC).[22] In 1979, the EEOC attempted to clarify Congress' intent in enacting Title VII by establishing criteria that an employer can use to implement an affirmative action plan consistent with the goals of the statute.[23] The EEOC first determined that Congress intended employers to voluntarily implement their own affirmative action plans.[24] According to the EEOC, an employer's plan is consistent with Title VII when the objective of the plan is to root out "practices, procedures, or policies" that have negatively affected minorities and women and to remedy the effects of past discrimination.[25] An employer's effort to remedy past discrimination or its effects may consist of training programs, comprehensive recruitment practices and modified criteria for policies concerning hiring, promoting, collective bargaining and terminating employees.[26]

In the end, when an employer's self-initiated affirmative action plan adheres to EEOC criteria, that employer is considered to

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[18] *See* Henry Schuldinger, Casenote, *Still Searching for the Limits of the Permissible Use of Affirmative Action*: United States v. Board of Education of the Township of Piscataway, 6 GEO. MASON U. CIV. RTS. L.J. 97, 102 (1996).

[19] Marks, *supra* note 9, at 571.

[20] Schuldinger, *supra* note 18, at 102.

[21] Marks, *supra* note 9, at 571.

[22] BARBARA A. BARDES ET AL., AMERICAN GOVERNMENT AND POLITICS TODAY: THE ESSENTIALS 136 (1994-1995 ed.).

[23] Marks, *supra* note 9, at 571-72.

[24] *Id.* at 571.

[25] Kathryn A. Sampson, Note, *Negotiating a Slippery Slope: Voluntary Affirmative Action After Johnson*, 14 J. CORP. L 201, 212 (1988) (discussing the EEOC's criteria for employers desiring to implement affirmative action plans).

[26] *Id.*

have made a good faith effort to adopt its plan in accordance with the guidelines set forth by the EEOC.[27] The employer is, thus, insulated from any potential Title VII claims.[28] The result is that in adjudicating Title VII claims, the Supreme Court has decided to give much consideration to the EEOC's interpretation of the statute and to its "guidelines, findings and opinions."[29]

III. UNITED STATES SUPREME COURT PRECEDENT ON TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The United States Supreme Court has decided several affirmative action cases not involving Title VII, where the Court struck down an employer's plan because it violated the Equal Protection Clause of the Fourteenth Amendment.[30] To the contrary, the Supreme Court, in deciding two significant cases involving Title VII, upheld the employers' affirmative action policies that benefited women and minorities as permissible under Title VII.[31] *United Steelworkers v. Weber*,[32] which the Court decided in 1979, and *Johnson v. Santa Clara County*,[33] decided in 1987, are the two leading cases on the issue of permissibility, under Title VII, of affirmative action in the workplace.[34]

A. United Steelworkers v. Weber

As stated by Kathryn A. Sampson in the *Journal of Corporation Law*,[35] *Weber* was the first case the Supreme Court decided involving affirmative action in employment.[36] Brian Weber,

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[27] Marks, *supra* note 9, at 572.

[28] *Id.*

[29] *Id.*

[30] *See* Savage, *supra* note 15, at 41.

[31] *Id.*

[32] 443 U.S. 193.

[33] *See* 480 U.S. 616.

[34] *See* Savage, *supra* note 15 (discussing the U.S. Supreme Court cases *United Steelworkers v. Weber* and *Johnson v. Santa Clara County).*

[35] *See* Sampson, *supra* note 25, at 201.

[36] *See id.* at 213-14.

an employee of Kaiser Aluminum & Chemical Corporation, was denied admission into a training program implemented in 1974 as a result of a collective-bargaining agreement between Kaiser and the United Steelworkers of America.[37] This training program was an affirmative action effort designed to increase racial balance and, specifically, the number of blacks within Kaiser's highly skilled work force.[38] To achieve its objective, Kaiser decided to accept trainees into the program based on seniority, but set aside fifty percent of the vacancies for blacks, which would be used only until the program achieved its overall objective.[39] Brian Weber brought a class action suit against Kaiser and United Steelworkers. The suit was brought on behalf of himself and other white employees who applied to the program and were denied admission, while blacks with less seniority were accepted.[40] The issue before the Court, narrowly stated by Justice Brennan, was "[w]hether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan."[41] The majority concluded that it did not.[42]

In addressing this issue, the Court looked at several factors, the first being Title VII itself.[43] The Court concluded that Congress' goal in enacting this statute was not to make unlawful "all voluntary, race-conscious affirmative action."[44] The Court determined, rather, that Congress enacted Title VII in response to concerns throughout the country regarding historical racial inequity from one century to the

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[37] *See Weber*, 443 U.S. 193, 198 (explaining that Kaiser adopted this training program in order to increase the number of black craftworkers in its predominantly white workforce).

[38] *See id.* at 199 (outlining Kaiser's goal to preserve at least 50% of the vacancies in the training program for blacks until the proportion of black craftworkers was representative of the proportion of blacks in the local workforce).

[39] *See id.* (discussing selection of craft trainees).

[40] *See id.* at 199 (describing how the most senior black selected into the training program had less seniority than several white candidates).

[41] *Id.* at 200.

[42] *See Weber*, 443 U.S. 193, 197 (stating that Title VII does not prohibit the private sector from initiating race conscious affirmative action plans).

[43] *See* Sampson, *supra* note 25, at 213-16 (discussing the *Weber* decision).

[44] *Id.* at 214.

next. It would not be consistent with Congress' goal to interpret Title VII as precluding an employer from voluntarily initiating efforts to remedy past discrimination, since this is precisely what Congress wanted employers to do.[45] After further review of the construction and legislative history of Title VII,[46] the Court then turned to Kaiser's plan to determine whether it was consistent with the statute.[47]

The Court first considered the objective of Kaiser's plan and held that it reflected the same objectives as Title VII, in that the plan and the statute were both designed to eliminate racial discriminatory practices and racial segregation.[48] Next, the Court considered whether Kaiser's plan "unnecessarily trammel[ed] the interests of white employees" and held that the plan did not because there was no need to layoff white employees in order to hire blacks.[49] Furthermore, the plan did not automatically hinder the progress of white employees.[50] Finally, the Court looked at the duration of the plan and concluded that the plan was temporary, as Kaiser would discontinue the plan once it achieved its objective of an increased racial balance in its skilled work force.[51] Although the Court failed to draw a clear distinction between those affirmative action plans that are permissible under Title VII and those that are not, it ultimately held that the Kaiser's affirmative action plan was permissible under the statute.[52] The Supreme Court's three-part analysis in deciding *Weber* has become the foundation for how courts should approach Title VII claims challenging the permissibility of an employer's affirmative action plan.[53]

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[45] *See id.* at 215 (discussing the inconsistencies of construing Title VII as a prohibition against all private sector affirmative action plans).

[46] *See Weber*, 443 U.S. 193.

[47] *See id.*

[48] *See id.* at 208 (explaining the purpose of both the affirmative action plan and the statute). The Court states that both are identical. *Id.*

[49] *Id.*

[50] *Id.*

[51] *Weber*, 443 U.S. 193, 208-09.

[52] *Id.* at 208.

[53] *See* Margaret Erin Buckley, *Affirmative Action: Voluntary Affirmative Action Plans Under Title VII and the Equal Protection Clause*, 56 GEO. WASH L. REV. 711, 712 (1988) (explaining the first two prongs of the test, the first of which asks whether the purpose of the affirmative action plan reflects the purpose of Title VII, and

B. Johnson v. Santa Clara County

Eight years after *Weber*, the Supreme Court decided its second Title VII case involving affirmative action in the workplace.[54] Unlike *Weber*, *Johnson v. Santa Clara County* involved the permissibility of an employer's voluntary affirmative action plan based on gender.[55] In 1978, the Santa Clara County Transportation Agency, by its own initiative, implemented an affirmative action plan that allowed the agency to take gender into consideration as an ameliorating factor when making decisions to promote employees into positions that had routinely been held by men.[56] Paul Johnson, a male employee of the transportation agency, filed suit on the grounds that he was passed over for a promotion.[57]

Justice Brennan, again writing for the majority, narrowly stated the issue as "whether in making the promotion[,] the Agency impermissibly took into account the sex of the applicants in violation of Title VII . . . ."[58] Because women have experienced discrimination similar to that experienced by blacks,[59] and because Title VII prohibits discrimination in employment decisions based on race and gender,[60] the Court approached *Johnson* similarly to how it approached *Weber*.[61] In reviewing the application of Title VII to gender based discrimination, the Court extended its statutory interpretation in

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the second which considers whether the plan pre-empts the interests of nonminority employees not benefited by the plan); *see also* Chris Engels, *Voluntary Affirmative Action in Employment for Women and Minorities Under Title VII of the Civil Rights Act: Extending Possibilities for Employers to Engage in Preferential Treatment to Achieve Equal Employment Opportunity*, 24 J. MARSHALL L. REV. 731, 746-47 (1991) (outlining the three-prong test, the third prong being that the court must find the plan temporary in nature and not permanent in that, the plan must be structured to achieve its goals within a certain period of time).

[54] *See* Schuldinger, *supra* note 18, at 108.

[55] *Johnson*, 480 U.S. 616.

[56] *Id.* at 620-21.

[57] *Id.* at 625. He stated in his brief that the agency, in complying with the affirmative action plan, promoted a female employee, Diane Joyce, who had fewer qualifications than he had. *Id.*

[58] *Id.* at 619.

[59] *Id.*

[60] *Id.*

[61] *Id.*

Weber to this case and held that "Title VII does not prohibit voluntary race-conscious affirmative action where it is necessary . . . to eliminate a 'manifest imbalance' that reflect[s] underrepresentation of women in 'traditionally segregated job categories.'"[62]

The Court then applied its three-prong analysis.[63] The first prong asks whether the objectives of the Santa Clara plan reflect the objectives of Title VII.[64] The Court found that the impetus behind the plan was the same as that of Title VII.[65] Santa Clara's consideration of Joyce's sex in deciding to promote her was a remedial effort to address a "manifest imbalance" as evidenced by the underrepresentation of women in "traditionally segregated job categories."[66]

The Court then considered the second prong of *Weber* and determined whether Santa Clara's plan "unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement."[67] In deciding this factor, the Court looked at several aspects of the plan.[68] The Court examined the plan in light of the Kaiser-USWA plan, which reserved fifty percent of the vacancies in its training program in favor of blacks.[69] The Court recognized that Santa Clara's plan was not designed to achieve a certain percentage of females in any given job category but, instead, was designed to allow the agency, when considering an employee for promotion, to take into account certain affirmative action factors during its consideration.[70] In this case, Joyce's sex was not the only factor taken into consideration, just one of several elements.[71] The Court further elaborated that Joyce was never guaranteed the promotion as a result of the plan because Santa Clara considered her against all the other

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[62] *Id.*

[63] *Johnson*, 480 U.S. at 631.

[64] *See id.* (asking whether the employment decision at hand was made pursuant to a plan that was similar to that in *Weber*).

[65] *See id.*

[66] *See id.*

[67] *See id.* at 637-38.

[68] *See Johnson*, 480 U.S. at 638.

[69] *See id.*

[70] *See id.*

[71] *See id.*

candidates including Johnson, and no one was denied consideration as a result of the agency attempting to comply with the plan.[72]

The Court then determined whether Santa Clara's plan met the third prong of the Weber analysis, which required the Court to look at the duration of the plan.[73] In reviewing this factor, the Court considered the language of the plan, which set forth Santa Clara's intention to "attain a balanced work force," but it made no mention of an intention to "maintain" one.[74] The Court concluded that although the plan did not specify its duration in terms of a set time frame or a specific goal to achieve,[75] it did meet Weber's "temporary" criteria. The goal was not to maintain a permanent balance along racial and gender lines,[76] but to slowly achieve balance within Santa Clara's workforce. The plan would achieve it in a way in which employment decisions would be made realistically and in a manner which would not unnecessarily infringe upon the valid expectations of employees not targeted to benefit from the plan.[77] In essence, the Court did not necessarily find that the plan itself was temporary but, rather, found that the plan was not permanent.[78] The Supreme Court's three-part analysis, introduced in *Weber* and further developed in *Johnson*, has become the legal framework for adjudicating Title VII claims.[79]

IV. THE HISTORY OF *PISCATAWAY TOWNSHIP BOARD OF EDUCATION V. TAXMAN*

In 1989, the Piscataway, New Jersey, Board of Education needed to eliminate one teaching position within the Business

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[72] *See id.*

[73] *See Johnson*, 480 U.S. at 639.

[74] *Id.* at 639.

[75] *See id.* at 640.

[76] *Id.*

[77] *See id.* (discussing how the Agency has taken a gradual approach to eliminating imbalance).

[78] *See* Sampson, *supra* note 25, at 227 (stating that the plan was geared only at attaining a balanced workforce).

[79] *See* Schuldinger, *supra* note 18, at 105 (stating that "Title VII cases continue to follow the" three-prong test of *Weber* and *Johnson*).

Department at Piscataway High School.[80] Generally speaking, when a school board is faced with having to make lay-offs, New Jersey State law requires the school board to terminate non-tenured teachers first and then tenured teachers in the "reverse order of seniority."[81] Sharon Taxman, who is white, and Debra Williams, who is black and the only teacher of color in the Business Department, were the two teachers in the department with the least seniority.[82] Taxman and Williams were actually of equal seniority because they had both been hired on the same day.[83] Since the School Board could not make its decision based on seniority as to which teacher it should lay off, it decided to review both teachers' qualifications.[84]

Taxman possessed a bachelor's degree in business education, a comprehensive teaching certificate that allowed her to teach an array of business education courses from bookkeeping and accounting to business math and business english. She also had three years of prior teaching experience at the high school level before coming to Piscataway.[85] Williams also possessed a bachelor's degree in business education and held a comprehensive teaching certificate that certified her to teach the same courses as Taxman.[86] While Williams had less than a year of teaching experience before coming to Piscataway, she possessed a master's degree in business education.[87] After reviewing both teachers' qualifications, which included equally impressive performance evaluations,[88] the School Board concluded

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[80] Taxman v. Board of Educ., 91 F.3d 1547, 1551 (3d Cir. 1996).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *See* Pulley, *supra* note 5, at 1 (acknowledging both teachers' educational backgrounds: Taxman attended the State University of New York at Buffalo, where she earned a bachelor's degree in business education; Williams earned a bachelor's degree in business education from Mississippi Valley State University and she earned a master's degree in business education from Mississippi State University).

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See* Harvey Berkman, *Exhibit A: White Employee Strikes Back; An Agency Explains Why it Switched Sides, After Winning a Reverse-Bias Award, The U.S. Justice Department Argues Against It*, NAT'L L.J., Feb. 6, 1995, at A12.

that, with regard to the factors that affected their decision making, both teachers had equal qualifications.[89]

In the past, when confronted with a lay-off decision involving two employees with equal seniority, the School Board invoked a tiebreaker based on "a random process which included drawing numbers out of a container, drawing lots or having a lottery."[90] Because of the rare nature of this case — where one teacher is black and the other white — the school superintendent recommended that the School Board make its decision based on the school district's affirmative action policy.[91] Because Williams was the only black teacher in the Business Department at Piscataway High School, the School Board decided that it would retain Williams and terminate Taxman[92] in order to achieve racial diversity within the department.[93] The School Board based its decision on the superintendent's recommendation to invoke the Board's affirmative action policy.[94]

After the School Board terminated Taxman, she filed an employment discrimination complaint with the EEOC and the New Jersey Division on Civil Rights.[95] The United States government eventually filed a Title VII claim against the Piscataway School Board on the grounds that the School Board's policy was impermissible under the statute, and Taxman joined the suit, challenging also the permissibility of the plan under Title VII.[96] Incidentally, Ms. Taxman was rehired in 1993 upon another teacher's early retirement.[97]

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[89] *See* DeWayne Wickham, *In Affirmative Action Case, Public Opinion Counts, Too*, USA TODAY, Oct. 9, 1997, at 15A.

[90] *Taxman*, 91 F.3d at 1551 (quoting the brief filed by the Piscataway Township Board of Education).

[91] *Id.*

[92] *Taxman*, 91 F.3d at 1551.

[93] *See* Jonathan Jaffe, *Appeals Court Upholds Reverse-Bias Damages*, STAR-LEDGER (NEWARK), Aug. 10, 1996, at 11.

[94] *Id.*

[95] *See* Schuldinger, *supra* note 18, at 119.

[96] *Taxman*, 91 F.3d at 1552.

[97] *See* Pulley, *supra* note 5.

V. PISCATAWAY TOWNSHIP BOARD OF EDUCATION'S AFFIRMATIVE ACTION PLAN

In 1975, the New Jersey State Board of Education mandated that all school districts within the state implement a policy promoting equal opportunity in education by creating two affirmative action plans: one targeted at practices used in the classroom and another at practices used in making employment decisions.[98] By the end of that year, the Piscataway Township Board of Education adopted an affirmative action plan with the objective of offering equal educational opportunities to students and equal opportunities in employment to employees.[99] There was no question that the School Board's objective was not to address past discrimination and its effects.[100]

Eight years later, the Piscataway School Board adopted a formal policy entitled "Affirmative Action-Employment Practices," which replaced the plan's initial "equal opportunity" objective.[101] The newly adopted policy allowed the School Board, when making decisions regarding employment, to make recommendations based on race in cases where two candidates were deemed equally-qualified.[102]

VI. *UNITED STATES V. BOARD OF EDUCATION FOR THE TOWNSHIP OF PISCATAWAY*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

In adjudicating the United States' claim that the School Board's action was impermissible under Title VII, the district court first reviewed the affirmative action plan under the Title VII standard as established by *Weber* and *Johnson*.[103] Based on the first prong of the *Weber/Johnson* analysis, the district court determined that an

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[98] *See* Schuldinger, *supra* note 18, at 115.

[99] *Id.*

[100] *Id.* at 116.

[101] *Id.*

[102] *Id.*

[103] United States v. Board of Educ. of Tp. of Piscataway, 832 F. Supp. 836, 842 (D.N.J. 1993).

employer may consider race in making decisions regarding employment only when an affirmative action plan is designed to remedy past discrimination.[104] The School Board admitted that its plan was not designed for remedial purposes, but that its goal was to "promot[e] racial diversity for the sake of education."[105] Because there was no precedent enumerating this non-remedial purpose, the district court refused to stretch the boundaries established by *Weber* and *Johnson* to include diversity as a purpose permissible under Title VII.[106]

In the absence of clear Title VII direction on whether diversity is a permissible affirmative action goal, the district court relied on cases involving claims against employers' affirmative action plans that were brought under the Constitution.[107] The Supreme Court, in adjudicating prior affirmative action claims brought under the Constitution, had held that any effort other than one to remedy specific acts of discrimination would fail the test for constitutional permissibility.[108] In applying a constitutional analysis to the School Board's affirmative action plan, the court found that the plan did not meet the constitutional standard of remedying prior discrimination.[109] The district court, ruling in favor of the United States and Taxman, granted them summary judgment on the issue of liability,[110] and the School Board appealed.[111]

The district court's review of Taxman's Title VII challenge under a constitutional analysis was flawed.[112] The court failed to recognize that the standard by which the Supreme Court reviews Title VII challenges is very different from the standard the Court uses in reviewing challenges brought under the constitution.[113] In adjudicating constitutional claims against an employer's affirmative

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[104] *See id.* at 844, 846.
[105] *Id.* at 845.
[106] *Id.*
[107] *Id.* at 121.
[108] *Id.*
[109] *See* Schuldinger, *supra* note 18, at 121.
[110] *Taxman*, 91 F.3d at 1552.
[111] *Id.* Taxman also appealed the district court's ruling on damages. *Id.*
[112] *Id.*
[113] *See* Schuldinger, *supra* note 18, at 121.

action plan, the Supreme Court imposes on the employer a higher standard of review and a greater burden of proof than it does in adjudicating Title VII claims.[114] The district court's analysis of the School Board's plan was terribly fragmented because the court commingled two different routes of legal analysis, both of which had different objectives.[115]

VII. *TAXMAN V. BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY*, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

On appeal, the Third Circuit addressed the issue of the School Board's liability under Title VII.[116] In doing so, the court needed to decide only whether the School Board's affirmative action plan was valid under the statute, as interpreted under both *Weber* and

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[114] *See id.*; Sampson, *supra* note 25, at 208-11 (comparing the differences between the standards of review and the burdens of proof employed in constitutional and statutory adjudication). The constitutional standard of review is concerned with applying the appropriate level of scrutiny, either "strict" or "middle-tier." In *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, Justice Powell insisted that all racial classifications are presumptively unconstitutional and, therefore, could not be justified unless its use is necessary to the achievement of a compelling state/governmental interest. Justice Brennan, however, proposed that benign racial classifications, although presumptively unconstitutional, should be reviewed according to a lower level of scrutiny whereby, the racial classification could be sustained if it serves an important (not compelling) state/governmental objective, and is substantially related (not necessary) to the achievement of that objective. The constitutional standard is also concerned with whether there is evidence of past racial discrimination and whether the employer's affirmative action plan is narrowly tailored to achieve its objective. The statutory standard of review also contains a level of scrutiny, but the Supreme Court has not defined it in terms of either "strict" or "middle-tier," but requires that the purpose of the affirmative action plan mirror the purpose of Title VII. This standard does not mandate that there be specific findings of past racial discrimination in that, the Court has never held that affirmative action plans are allowed only to remedy past discrimination and its effects. Lastly, the Title VII standard is similar to the constitutional standard because it is concerned with whether the plan is excessively intrusive on the rights of those not benefited by the plan).

[115] *See* Schuldinger, *supra* note 18, at 122 (explaining how the district court erred in its analysis).

[116] *Id.*

Johnson.[117] In determining the validity of the plan based on the first prong of the three-prong test, the court addressed whether the racial diversity objective of the School Board's plan reflected the objectives of Title VII.[118] The two primary objectives of Title VII, as stated by the court, are "to end discrimination on the basis of race, color, religion, sex or national origin, thereby guaranteeing equal opportunity in the workplace, and to remedy the segregation and underrepresentation of minorities that discrimination has caused in our Nation's work force."[119]

The court of appeals concluded, after reviewing the legislative history of Title VII, that Congress did not consider diversity as one of the goals of the statute.[120] The court further concluded that as long as an affirmative action plan has some remedial purpose, the plan can be considered to "mirror the purposes of the statute . . . ."[121] Because the School Board's plan, according to the court, served no remedial objective, but only the goal of "promoting racial diversity 'for education's sake,'"[122] the court found the plan impermissible under Title VII in terms of the ends that it sought to pursue.[123]

The court then looked at the second prong of *Weber/Johnson*, which asks whether the School Board's plan excessively intrudes on the expectations of nonminorities.[124] The court of appeals concluded

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[117] *Id.* at 1557 (stating that this case involves "straight forward statutory interpretation" of Title VII as interpreted by the Supreme Court in *Weber* and *Johnson*).

[118] *See Taxman*, 91 F.3d at 1550 (stating the purpose of affirmative action plans must reflect the purpose of the statute).

[119] *Id.* at 1557.

[120] *Id.* (stating the goals of Title VII and discussing the legislative history).

[121] *Id.*

[122] *Id.* at 1558 (discussing the majority opinion in United States v. Bd. of Educ. of Tp. of Piscataway, 832 F. Supp. at 845 (D. N.J. 1993)).

[123] *See Taxman*, 91 F.3d at 1563. The Board acknowledged that its purpose was not to remedy past discrimination but rather to obtain an "educational benefit" by creating a racially diverse staff. *Id.*

[124] *Id.* at 1564. Although the court of appeals found that the School Board's plan violated Title VII on the grounds that the plan did not meet the first prong of *Weber/Johnson*, the court nevertheless continued its analysis under the second prong. *Id.* Judge Mansman, writing for the majority, announced: "We hold that Piscataway's affirmative action policy is unlawful because it fails to satisfy either prong of Weber." *Id.* This suggests that had the plan satisfied only one prong of the *Weber/Johnson* analysis the court would have upheld the plan as permissible under Title VII. *Id.*

that the plan lacked the characteristics of those affirmative action plans that the United States Supreme Court has sustained.[125] The School Board's affirmative action plan, according to the court, did not include objectives and guidelines by which to measure progress in achieving the plan's objectives.[126] As a result, there was nothing to ensure that the School Board's decisions regarding employment would actually provide appropriate racial preferences for attaining the plan's objectives.[127] For this reason, the court concluded that the School Board's plan avoidably restrained the progress of nonminority employees and, therefore, violated Title VII.[128] The court of appeals ultimately held that the affirmative action plan was impermissible under Title VII, and upheld the district court's finding that the Piscataway School Board was liable under the statute.[129] Following the Third Circuit's decision, the School Board appealed to the United States Supreme Court, and the Court granted certiorari.[130]

The Third Circuit upheld the district court's ruling in an 8-4 decision.[131] Although only four judges dissented, the analysis articulated by Chief Judge Sloviter is worth exploring.[132] The dissent

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[125] *Id.* at 1564.

[126] *Id.*

[127] *Id.*

[128] *Taxman*, 91 F.3d at 1564.

[129] *Id.* at 1565. The court, without explaining why it did not address the third prong of *Weber/Johnson*, concluded its analysis with the second prong. *Id.*

[130] Piscataway Bd. of Educ. v. Taxman, 117 S. Ct. 2506; Piscataway Bd. of Educ. v. Taxman, 118 S. Ct. 595. This case was removed from the Supreme Court's docket just weeks before arguments were scheduled to begin because the parties agreed to a settlement. *Id.*

[131] *Taxman*, 91 F.3d at 1547. *Taxman* was argued before the entire thirteen-judge panel of the United States Court of Appeals for the Third Circuit, but Judge Sarokin retired before the court issued its opinion. *Id.*

[132] *Taxman*, 91 F.3d at 1567 (Sloviter, C.J., dissenting). Chief Judge Sloviter suggested that the majority's analysis was flawed and similar to that of the district court in that, the majority reviewed the permissibility of the School Board's affirmative action plan under Title VII based on the more demanding constitutional standard of review. The dissent's approach was similar to that employed by the *Johnson* Court. After examining the School Board's plan, the Chief Judge concluded that the objectives of the plan in no way mandated that the School Board select Williams over Taxman. Rather, the plan "place[d] before the School Board the need to consider minority personnel among other equally qualified candidates for employment decisions." *Id.* at 1568-69.

first addressed the majority's interpretation of Title VII.[133] According to the Chief Judge, the Supreme Court, in deciding *Weber* and *Johnson*, never declared diversity an impermissible factor that an employer may not consider in making employment decisions.[134] Likewise, the Court never declared all purposes, outside of remedying past discrimination, impermissible in designing an affirmative action plan.[135] Chief Judge Sloviter stated that

> Title VII was intended, in part, "to eliminate those patterns that were potential causes of continuing or future discrimination," and because "racial homogeneity in schools was viewed as among the most fundamental and pernicious aspects of the social pattern undergirding the system of discrimination," the achievement of diversity, in the educational context . . . , is consistent with the purposes underlying Title VII.[136]

The Chief Judge disagreed with the majority that *Weber* and *Johnson* represent a three-prong standard for courts to apply in adjudicating Title VII challenges to an employer's affirmative action plan.[137] Instead, he contended that both cases should be understood as the Court's approval of affirmative action plans not expressly mirroring the word-for-word interpretation of Title VII.[138] The dissent suggested that "a racially diverse faculty is consistent with the goals of Title VII because Congress intended Title VII to be forward-looking legislation with the broad goal of eliminating the causes of discrimination."[139] In essence, Chief Judge Sloviter determined that

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[133] *Civil Rights Act of 1964—Title VII—Affirmative Action—Third Circuit Holds that Diversity Is Not, in Itself, a Sufficient Justification for Granting Preferences to Minorities*—Taxman v. Board of Education, 110 HARV. L. REV. 535, 537 (1996).

[134] *Id.*

[135] *Id.*

[136] *Id.* (quoting H.R. 88-914, pt. 1 at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393).

[137] *Two-Pronged Test for Determining the Validity of Affirmative Action Plans Under Title VII:* Taxman v. Board of Education, 38 B.C. L. REV. 371, 378 (1997).

[138] *Id.*

[139] *Id.*

affirmative action plans implemented to counter future discrimination could also reflect the objectives of Title VII.[140] He believed that a racially diverse faculty could influence students' attitudes in such a way that will dispel future discriminatory practices in employment and have a far more reaching impact beyond the context of Piscataway High School.[141]

VIII. ARGUMENTS THAT MIGHT HAVE BEEN MADE HAD *PISCATAWAY TOWNSHIP BOARD OF EDUCATION V. TAXMAN* NOT BEEN REMOVED FROM THE SUPREME COURT CALENDAR

Because this case once topped the Supreme Court's docket,[142] many speculated as to why the Court agreed to hear this case.[143] Some were concerned that the Supreme Court would use *Piscataway Township Board of Education v. Taxman* as an opportunity to make broad rulings on the permissibility of affirmative action in employment.[144] Others believed that the Court would use this case as a chance to restrain employers' efforts to promote racial equality.[145] Still others saw this as an opportunity for the Court to abolish affirmative action plans altogether.[146]

Much of the interest in this case stemmed from what some considered the Third Circuit's "over-interpretation" of Title VII and its holding that affirmative action plans in employment may be used for remedial purposes only.[147] This interpretation drew support from

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[140] *Id.* at 380.

[141] *See id.*

[142] *See* Neil A. Lewis, *U.S. Details its Stance on Bias Remedies: Walking a Fine Line in Piscataway Case*, N.Y. TIMES, Aug. 23, 1997, at 8 (stating that this case would attract the greatest attention of all those currently on the Supreme Court's calendar).

[143] *See* Robert Cohen, *Justice Review Race as a Factor in School Layoff Piscataway Case Options Weighed*, STAR LEDGER, Jan. 22, 1997, at 15 (noting various views and concerns about the Supreme Court hearing this case).

[144] *Id.*

[145] *Id.* (stating the views of civil rights advocates).

[146] *Id.* (noting that within GOP-controlled Congress there is a strong desire to eradicate affirmative action programs).

[147] *See* Glenn C. Smith, *'Piscataway' is the Wrong Title VII Test Case*, NAT'L L.J., Oct. 13, 1997, at A23.

the American Civil Liberties Union[148] in favor of the School Board to the extent that affirmative action plans in employment are permissible for purposes other than remedying past discrimination.[149] The Clinton Administration's Justice Department, which had decided once again to support Taxman,[150] agreed that there were circumstances in which affirmative action could be used for non-remedial purposes.[151] Even Sharon Taxman, who disagreed with the manner in which the School Board set out to pursue its goal, agreed that racial diversity could be a valid goal of the School Board's plan.[152]

The effects of the issue involved in this case extended well beyond the two teachers around whom so much controversy arose.[153] Although Sharon Taxman was a party to the case,[154] the broad reach of this case was evident in the way the School Board presented the question to the Court in its petition for appeal.[155] Specifically, the question was "whether Title VII still 'permits employers to take race

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[148] *Hannity & Colmes* (FOX News Channel, television broadcast Oct. 6, 1997) (moderating a debate between Nadine Strossen, President of the American Civil Liberties Union and Clint Bolick, Litigation Director of the Institute for Justice, during which, Ms. Strossen stated that the ACLU filed an amicus brief on behalf of the School Board primarily because of the Court of Appeals' ruling that affirmative action could only be used to remedy past discrimination).

[149] *Id.*

[150] *See* Lewis, *supra* note 142 (noting that the Justice Department under President Bush's Administration supported Sharon Taxman; under President Clinton, the Justice Department decided to switch sides in favor of the School Board, but has since changed its mind and has returned to supporting Ms. Taxman).

[151] *See* Lewis, *supra* note 142 (stating that although the Clinton Administration is no longer supporting the School Board, it does agree that affirmative action programs can be useful for certain non-remedial purposes). For example, even without a history of past discrimination, a police department would be allowed to use diversity as a goal in hiring and promotion, in order to increase minority representation. *Id.*

[152] *See* Joseph McCaffrey, *Teacher Argues Layoff Was a Race-Bias Play*, STAR LEDGER (NEWARK), Jan. 25, 1995 (reporting that Taxman's attorney, in response to questions asked by Judge Hutchinson of the Third Circuit, stated that the school board's goal of racial diversity was valid, but only under certain circumstances, obviously not present in this case).

[153] *See* Hannity, *supra* note 148. Ms. Strossen explicitly stated that this case concerns more than teachers Taxman and Williams. *Id.*

[154] *See* Pulley, *supra* note 5, at 32. (stating that although Debra Williams is not a party to the case, she refuses to be ignored).

[155] *See* Hannity, *supra* note 148.

into account for purposes other than remedying past discrimination.'"[156] From *Weber* and *Johnson* came an analysis by which to measure an employer's affirmative action plan against Title VII of the Civil Rights Act of 1964.[157] That analysis, however, would not have necessarily made this case any easier for the Supreme Court to decide because in *Weber* and *Johnson* the Court framed the issue rather narrowly.[158] The new issue presented by this case was, in essence, whether an employer, when making employment decisions, may take race into account for the purpose of promoting diversity in an educational environment.[159]

On its face, this case seemed rather one-sided because it appeared to involve clear-cut racial discrimination.[160] Realistically, how much of a defense could the School Board make in support of laying off a white teacher "just because she is white"?[161] For this reason, some concluded that the School Board never stood a chance of winning in the Supreme Court.[162] Nevertheless, in deciding this case, the Court would have confronted strong arguments not just from Taxman but from the School Board as well, as demonstrated by a mock hearing hosted by the College of William and Mary Marshall Wythe School of Law.[163]

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[156] Savage, *supra* note 15 (quoting Brief for Appellant, Piscataway Township Bd. of Educ. v Taxman, No. 96-679).

[157] *See* Buckley, *supra* note 53; *see also* Engels, *supra* note 53.

[158] *See also* Engels, *supra* note 53 (stating that *Weber* and *Johnson* together fail to distinguish permissible and impermissible purposes for affirmative action).

[159] *Taxman*, 91 F.3d 1547 (concluding that the purpose of the School Board's affirmative action plan was to "promote racial diversity 'for education's sake'").

[160] *Id.* at 1552 (stating that Taxman filed an employment discrimination claim with the Equal Employment Opportunity Commission after the School Board laid her off as a result of its affirmative action plan).

[161] Rick Hampson, *Can Race Decide Who Keeps a Job?*, USA TODAY, Oct. 6, 1997, at 14A (stating that "Williams kept her job because she was black; Taxman lost hers because she was white").

[162] *See* Wickham, *supra* note 90 (predicting that the School Board would probably lose this case).

[163] *Piscataway v. Taxman Moot Court* (C-SPAN, television broadcast, Oct. 24, 1997) (an enactment of what arguments counsel for both sides might have made and how the Court might have ruled had the case been argued before the Supreme Court) [hereinafter *Moot Court*].

During the mock trial, the School Board stood firm in its assertion that there is a great benefit from diversity in an educational environment, and, therefore, race should be allowed to be taken into consideration in employment issues.[164] The School Board stood just as firm on its belief that race should be of no significance whatsoever where one teacher has less seniority and is less qualified than another.[165] The School Board's proposition that there is educational value in diversity was not new.[166] In fact, this proposition was familiar to the Supreme Court because it was addressed in *Regents of the University of California v. Bakke*.[167]

The School Board's affirmative action plan did not expressly state the time within which the Board targeted to achieve its diversity goal[168] (the third-prong of *Weber*). The School Board, however, did suggest that "backward-looking remedies," designed to eliminate discrimination and its effects within a specified time frame, are not the only permissible remedies in implementing an affirmative action plan, but "forward-looking remedies" are also allowed for the purpose of attaining racial balance.[169] The Third Circuit agreed that the Court, in deciding *Weber* and *Johnson,* allowed some room for flexibility in

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[164] *See* Jaffe, *supra* note 93 (expounding on the School Board's argument that diversity should be considered particularly under the circumstances present in this case, where there are two teachers with equal seniority and deemed equally qualified).

[165] *Id.*

[166] *Taxman*, 91 F.3d at 1561.

[167] 438 U.S 265 (1978) (involving a constitutional "challenge to the special admissions program of the Medical School of the University at California at Davis" by a white applicant who had been denied admission after applying through the regular admissions program). Bakke, the challenger asserted that he had been denied admission because the school, through its special admissions program, had reserved 16 out of 100 seats in its entering class for minority applicants who had lower grade point averages and MCAT scores than he had. *Id.* The Court found that while the University's special admissions program was unlawful, the University could take race into account as one factor in making admissions decision for the purpose of promoting diversity in an educational environment. *Id.*

[168] *Taxman*, 91 F.3d 1547.

[169] *See* McCaffrey, *supra* note 152 (referencing made by the School Board's attorney).

that the plans in both cases slightly departed from the sole purpose of remedying past discrimination.[170]

The argument that the plan's fatal flaw was that it did not state a timeframe for achieving diversity was debated in the mock hearing of *Piscataway v. Taxman Moot Court*.[171] Suzanna Sherry,[172] who portrayed counsel for Piscataway, pointed out that in *Johnson* the Court upheld Santa Clara's plan, which did not state a "target end." She argued that the Supreme Court should allow Piscataway's plan, which did not state a "target end" because, by promoting diversity, it would eventually eliminate any vestiges of discrimination and, therefore, would create an environment where students can appreciate diverse racial and ethnic backgrounds.[173]

In the actual case, the School Board contended that by retaining Williams based on its desire to foster a diverse environment, all children, not just black children, benefited.[174] While all children may have benefited, the School Board should not have felt shy in asserting the significant benefits afforded black children by fostering such diversity.[175] As pointed out by Sherry, and echoed by Richard Carelli,[176] who served as one of the nine justices in the mock hearing, children should not be led into thinking that black teachers belong in certain areas and do not belong in others.[177] Carelli continued by positing that the School Board, by eliminating the only black teacher in the business department and thus creating an all-white department, may have discouraged black students from enrolling in business courses because they may think that it is an "all-white game."[178] He concluded that creating a diverse environment allows students an opportunity to see that people of different racial and ethnic

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[170] The court also stated, however, that there was no room for additional non-remedial departures. *Id.*

[171] *Moot Court*, *supra* note 163.

[172] Professor at the University of Minnesota Law School.

[173] *Moot Court*, *supra* note 163.

[174] *See* Hampson, *supra* note 161.

[175] *Moot Court*, *supra* note 163.

[176] Supreme Court Correspondent for the Associated Press.

[177] *Moot Court*, *supra* note 163.

[178] *Id.*

backgrounds are capable of succeeding in an array of disciplines and are not just limited to certain fields.[179]

One may question how far a school must go to achieve diversity,[180] and whether it is sufficient to attain diversity on the level of the school district, or even of the school itself, and not necessarily at the level of each department.[181] Taxman argued that in addition to the absence of a history of past discrimination, there was no "manifest imbalance" on the part of the school because the percentage of black employees at the school and the percentage of black teachers at the school were both greater than that of the blacks in the relevant work force.[182] The School Board's response to this argument was — when looking at this issue through the eyes of the students — how relevant is it whether there is imbalance in the larger scheme.[183] What should matter, the School Board contended, is the students' "frame of reference" and what they are exposed to in the classroom.[184]

In the mock hearing,[185] Sherry distinguished the Piscataway case from *Wygant v. Jackson Board of Education.*[186] In *Wygant*, a group of nonminority teachers challenged the constitutionality of its School Board's affirmative action policy, adopted through a collective bargaining agreement. The policy provided that in the event lay-offs became necessary due to budget constraints, they would be made based on seniority, but "at no time [would] there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the lay-off."[187] In other words, if, for example, thirty percent of the school district's faculty was black, then no more than thirty percent of Jackson School Board's

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[179] *Id.*

[180] *See* Berkman, *supra* note 88 (referring to an inquiry by Judge Hutchinson, Third Circuit, regarding the extent to which courts must go in looking for diversity).

[181] *Id.*

[182] *See* Cohen, *supra* note 143; Pulley, *supra* note 5 (stating that "[o]f some 6200 students in Piscataway's schools, 50 percent are white, 30 percent are African-American, 10 percent are Asian and 5 percent are Hispanic [and] [t]he racial and ethnic composition of the teaching staff in the district has long reflected the population.").

[183] *See* Berkman, *supra* note 88.

[184] *Id.*

[185] *Moot Court*, *supra* note 163.

[186] 476 U.S. 267 (1986).

[187] *Id.*

black faculty members could be laid off. Sherry, by emphasizing the fact that race had been used as a tie-breaker between "identically situated teachers," distinguished these two cases to show that the Piscataway School Board's plan did not violate the second prong of *Weber*.[188] First, *Wygant* was brought under the Equal Protection Clause of the Fourteenth Amendment, which imposes a stricter standard than does Title VII.[189] Second, the plan in *Wygant* called for laying off white teachers who had greater seniority than the black teachers who were retained.[190] On these bases, the Court concluded that the plan in *Wygant* "unnecessarily trammeled" the interest of the white teachers who were laid-off because, based on their seniority, the white teachers had a 100% level of expectation that they would be retained. Nevertheless, for the sake of retaining black teachers, the plan required that the Jackson School Board lay-off white teachers who would have been retained otherwise.[191]

Unlike *Wygant*, the Court in *Johnson* held that Santa Clara's plan was permissible because, since the plaintiff had no guarantees that he would be promoted, the plan did not interfere with his rights nor should it have diminished his level of expectation.[192] In the mock hearing, Taxman argued that the cost to the individual laid-off as a result of an employer's affirmative action plan is too burdensome, and that in the absence of the School Board's affirmative action plan, Taxman had at least a fifty percent expectation of being retained.[193] By invoking the plan, because she was white, the School Board eliminated any chance Taxman may have had of the School Board retaining her.[194] Chief Judge Sloviter, however, pointed out that because Taxman "would have had no more than a fifty percent chance of not being laid off" had the Board not invoked the plan, she did not have a "legitimate and firmly rooted expectation of [not being laid

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[188] *Moot Court*, *supra* note 163.
[189] *Wygant*, 476 U.S. at 273.
[190] *Id.* at 271.
[191] *Id.*
[192] *Johnson*, 480 U.S. at 618.
[193] *Moot Court*, *supra* note 163.
[194] *Id.*

off]."[195] Accordingly, her rights were not "unnecessarily trammeled."[196]

Samuel Issacharoff,[197] representing Taxman in the *Piscataway Moot Court*, echoed Senator Clark in his remarks that any purposeful effort to maintain racial balance would violate Title VII because maintaining that balance requires an employer to make decisions on the sole basis of race.[198] In *Johnson*, the Court looked at the express language of the plan to determine its objective. It concluded that since there was no mention of a desire to "maintain" a balanced work force but, rather, a desire to take a "moderate and gradual approach" in achieving its goal, the Court held that the plan met the third prong of *Weber*.[199] Like Santa Clara's plan, the School Board's plan made no mention of a desire to "maintain" a racially balanced work force.[200] The Board's plan evidenced a desire to achieve a racially diverse teaching staff in an educational environment by considering race in those cases where two teachers have equal seniority and are deemed equally qualified.[201]

Although, at first glance, this case appeared to be stacked against the School Board, plausible arguments existed on both sides. Because the case settled, however, one can only speculate about how *Piscataway Township Board of Education v. Taxman* might have played out before the Supreme Court.

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[195] *Taxman*, 91 F.3d at 1574.

[196] *Id.* at 1576 (stating that "the Board's action was not overly intrusive on Taxman's rights.")

[197] *See Case May Test School's Responsibility*, CHARLESTON GAZETTE, Mar. 23, 1998, at 2A (indicating that Mr. Issacharoff is a law professor at the University of Texas).

[198] *See* Charles T. Castnady, *America's Struggle for Racial Equality*, Policy Review, Jan. 1, 1998, at 42 (quoting Senator Joseph Clark remarks at a congressional hearing on enacting the statute).

[199] *Johnson*, 480 U.S. at 639-40.

[200] *See* Schuldinger, *supra* note 18, at 115-17 (reviewing the School Board's affirmative action plan).

[201] *See* Jaffe, *supra* note 93.

IX. THE SETTLEMENT

Less than two months before arguments were scheduled to begin in the Supreme Court case of *Piscataway Township Board of Education v. Taxman*,[202] another unusual twist was added to the already unusual facts of this case.[203] The case that many anticipated would establish a new precedent on the permissibility of affirmative action plans in the workplace was settled.[204] Although supporters and opponents of affirmative action viewed the settlement differently in terms of whether it tarnished the credibility of those affirmative action supporter who orchestrated the settlement,[205] both sides agreed that the set of facts in this case placed the future of affirmative action in employment in a vulnerable position.[206] Opponents of affirmative action, disappointed that the case was settled,[207] criticized those who financed the settlement for trying to buy time, as they believed the end is near for race-based preferences.[208] Those in favor of the settlement, however, viewed it as an effective legal strategy to prevent "bad cases [from] mak[ing] for bad law."[209]

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[202] 118 S. Ct. 595 (1997).

[203] *See* Linda Greenhouse, *Tactical Retreat, New Jersey School Move Leaves Affirmative Action in Limbo*, N.Y. TIMES, Nov. 22, 1997 at 1 (stating that the case ended with an unusual financial settlement, 70 percent of which was financed by a group of civil rights organizations).

[204] *See id.* (reporting that this case which had developed "into a major Supreme Court test of the role of race in the workplace" was settled for $433,500, $186,000 of which Taxman received for $144,000 in back-pay plus interest, and the remaining $247,500 was paid to her attorneys).

[205] *See* Barry Bearak, *Settlement Ends High Court Case on Preferences: Rights Groups Ducked Fight, Affirmative Action Opponents Say*, N.Y. TIMES, Nov. 22, 1997 at 1 (quoting affirmative action supporter, Hugh B. Price, president of the National Urban League, stating that "[t]his case has such a narrow set of circumstances, and the fear was that this case could spill over into other factual situations. The Court has ruled that race can be used as one factor in promoting diversity, and you wouldn't want a wide ruling that changes that."). The article also quotes affirmative action opponent, attorney Douglas Cox who stated that this settlement "blows a huge hole" in the credibility of those who financed the settlement. *Id.*

[206] *See id.*

[207] *See id.*

[208] *See id.* (quoting Roger Clegg, general counsel for the Center of Equal Opportunity, stating "[t]he people who favor racial preferences are on the run.").

[209] *See id.* (quoting Hugh B. Price).

Proponents of affirmative action are sure the Supreme Court will have another opportunity to rule in favor of affirmative action, as the next case is guaranteed to have a less unusual set of facts than *Taxman*.[210] In addition to hoping for a set of facts more favorable towards affirmative action, supporters also hope for a more favorable Supreme Court bench,[211] as it has grown more hostile towards affirmative action plans over the past few decades.[212]

The settlement of *Taxman*[213] leaves employers, except those located in the jurisdiction of the Third Circuit Court of Appeals, still unclear as to what purposes they may pursue, through an affirmative action plan, under Title VII.[214] Although many issues remain unsettled about what purposes are permissible under Title VII,[215] removing this case from the Supreme Court's docket[216] means that the Third Circuit's broad ruling that affirmative action is only permissible to remedy past discrimination is still good law.[217] Ironically, it was

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[210] *See* J. Scott Orr, *Affirmative Action Buys Some Breathing Room; After Piscataway Case, No Pressing Issues*, STAR LEDGER (NEWARK), Nov. 23, 1997, at 13 (stating that defenders of affirmative action programs have greater likelihood of winning the next time a case makes it to the Supreme Court).

[211] *See* Tony Mauro & Gary Fields, *Settlement Prolongs Affirmative Action Fight*, USA TODAY, Nov. 24, 1997, at 4A (quoting Kweisi Mfume, president of the NAACP, stating that "the [C]ourt could have changed" when the next case involving affirmative action arises).

[212] *See id.* (discussing how "civil rights groups [view the Supreme Court] as a place to avoid").

[213] 118 S. Ct. 595 (1997).

[214] *See* Bearak, *supra* note 205 (posing several questions still unanswered, such as "Is the goal [of affirmative action] simply to treat all people, whatever their race or gender, the same? Is the legacy of discrimination sufficient reason to give some people a boost up? Is racial diversity alone sufficient reason to give minority groups an advantage?").

[215] *See* Greenhouse, *supra* note 203 (acknowledging that the settlement "leaves the state of affirmative action law unsettled").

[216] *See id.* (explaining that "in the absence of a live controversy, the Court lacks jurisdiction under . . . Article III of the Constitution," so the Court is certain to grant dismissal pursuant to a joint motion which lawyers for both sides are expected to file).

[217] *See* Harvey Berkman, *Supremes May Get Other Affirmative Action Cases*, NATL. L.J., Dec. 8, 1997, at A10 (stating that the Third Circuit's decision remains precedent).

the Third Circuit's ruling that attracted outside support in favor of the School Board.[218]

X. CONCLUSION

It has been stated more than once that, because of its unique circumstances, *Taxman* was far from an ideal case and a rather dangerous one for the Supreme Court to use to make a national ruling on the status of affirmative action in the workplace. In one sense, this case was bigger than Sharon Taxman and Debra Williams, but in another, it was difficult to ignore the extent to which this case impacted both teachers' lives.

The issue in this case extended well beyond these two teachers. The Third Circuit's ruling that affirmative action can only be used when remedying past discrimination resulted in pleas to the high Court to rule narrowly on this case — just enough to overrule the Third Circuit's "over-interpretation" of Title VII, *Weber*, and *Johnson*. Additionally, there was the issue concerning the value of racial diversity in an academic setting, but the debate surrounded the circumstances under which diversity is most beneficial and the methods by which to achieve that diversity.

In considering these two teachers, it is easier to identify with the burden placed on Ms. Taxman, as she lost her job because the School Board concluded that she was dispensable as far as achieving diversity was concerned. It is a very high price for an individual to pay when lay-offs are made on the basis of affirmative action. This is precisely why courts, while allowing affirmative action plans for the purpose of "attaining" goals, have never allowed these plans for the purpose of "maintaining" them.

Ms. Williams, although not a party to this case, and often viewed as the teacher who benefited on account of her race, carried a burden as well. The silent argument in this case was that while Ms. Williams was valuable to the School Board in achieving its goal of racial diversity, her qualifications should not have been overlooked. Ms. Williams was concerned that the School Board retained her

[218] *See* Hannity, *supra* note 148; Lewis, *supra* note 142.

because of her race rather than because she was better qualified, as she holds a master's degree and Ms. Taxman does not. This is a subtle attack on the School Board's use of affirmative action because there is often a contention that those who are intended to benefit from affirmative action do so purely based on their status, whether it be race or gender, and not because they are qualified and capable of doing the job.

The Piscataway School Board has been criticized for the way in which it handled this matter, particularly for not making its decision of which teacher it would retain based on qualifications — after all, two teachers cannot be identical. However, whether it be good or bad, had the School Board not invoked its affirmative action plan, this case, which was slated as the most compelling on the Supreme Court's docket, would not have occurred. The Third Circuit stated that although *Weber* and *Johnson* upheld affirmative action plans that did not expressly reflect Title VII objectives of remedying past discrimination, these cases do not "open the door" for plans expressing additional non-remedial purposes. In light of the fact that the Court, in deciding *Weber* and *Johnson*, narrowly ruled on the issues, never clearly distinguishing what purposes are permissible and what purposes are not under Title VII, the Third Circuit was too presumptuous in its analysis. In the absence of a clear distinction, how else will employers know which purposes are permissible and which are not but for implementing plans for purposes other than those the Supreme Court enunciated in *Weber* and *Johnson*, and the Third Circuit in *Taxman*. Employers will have no choice but to anticipate that their plans will be challenged under Title VII of the Civil Rights Act of 1964 and hope that their cases make their way to the Supreme Court.

Katrina Patterson